In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-961

JOSEPH GENTILE AND ERNEST LAPONZINA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that certain evidence should have been excluded because it was obtained in violation of administrative regulations and that the court misinterpreted a request made by the jury after it had begun deliberating to have a tape recorded conversation replayed. Petitioner LaPonzina also contends that the Double Jeopardy Clause of the Fifth Amendment barred his second trial and his ultimate conviction.

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of having bribed and conspired to bribe an employee of the Internal Revenue Service, in violation of 18 U.S.C. 2, 201(b) and 371.[1] Gentile was sentenced to concurrent

[1]Gentile was convicted on three counts and LaPonzina on one count of having bribed an employee of the Internal Revenue Service, in violation of 18 U.S.C. 201(b) and 2. Both petitioners were also convicted on one count of having conspired to bribe an I.R.S. employee, in violation of 18 U.S.C. 371.

terms of four years' imprisonment and was fined $5,000. LaPonzina was sentenced to three years' imprisonment, all but six months of which was suspended, and was placed on probation for thirty months. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that Special Agent Nicholas Tsotsos of the I.R.S. met with petitioner Gentile in September 1971 in connection with an investigation of certain of Gentile's tax returns. After having shown Gentile his credentials and explained that he was engaged in a criminal investigation, Tsotsos stated that he wanted to ask Gentile some questions but that Gentile did not have to answer and that any answers he did offer could be used against him. Gentile stated that he understood and gave Tsotsos permission to question him (App. 52a-53a).[2] Tsotsos then proceeded to ask Gentile about approximately $20,000 in checks that had been cashed for him in 1969 by his income tax advisor (Gov't App. 5b).

At subsequent meetings, Agent Tsotsos showed Gentile some of the checks that had been cashed in 1969. He also pointed out that there was a wide discrepancy between Gentile's annual expenditures and the income that he had reported. These conversations, all of which were recorded on a device concealed on Agent Tsotsos' person, eventually led to Gentile's suggesting that he and Tsotsos might be able to reach an accommodation that would avoid Gentile's prosecution (Gov't App. 5b-17b). On June 14, 1972, Gentile offered to pay Agent Tsotsos $3,000 to abort the investi-

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[2] "app." refers to the appendix to the brief filed by petitoners in the court of appeals. "Gov't App." refers to the appendix to the brief by the government in the court of appeals. Copies of both documents are being lodged with the Clerk of this Court.

gation. Gentile paid the bribe on June 15, 1972 (Gov't App. 18b-33b; App. 66a).

At the June 14th meeting, Agent Tsotsos also informed Gentile that he had a case against LaPonzina, and he asked whether Gentile could arrange a meeting with him (App. 63a-66a, 68a). Gentile subsequently agreed to do so, and the initial meeting with LaPonzina took place at Gentile's place of business on June 29, 1972 (Gov't App. 34b-38b). Following a later conversation with Gentile, who suggested that discontinuance of the investigation of LaPonzina was worth $1,000, Agent Tsotsos met with LaPonzina a second time and LaPonzina agreed to pay Tsotsos $1,000. Gentile gave Tsotsos the $1,000 on August 9, 1972 (App. 100a-107a, 118-119a, 136a-138a).

1. Petitioners first contend (Pet. 9-10) that the court erred in admitting at trial evidence concerning statements they had made during the meetings with Agent Tsotsos because Tsotsos had not first fully informed them of their legal rights.[3]

The purpose of the I.R.S. directives relied upon by petitioners in making this claim is to extend the protections accorded by *Miranda* v. *Arizona*, 384 U.S. 436, to criminal tax investigations conducted in a noncustodial context. As the court of appeals pointed out, however, the offer and giving of a bribe constitutes an offense independent of the offense of tax evasion, which was the basis for

[3]Petitioners base this claim upon the procedures that special agents of the I.R.S. have been directed to follow in conducting criminal tax investigations by I.R.S. News Release No. 897, issued on October 3, 1967, and News Release No. 979, issued on November 26, 1968 (see Pet. App. E). Agent Tsotsos did not fully advise petitioners of their legal rights in a criminal tax investigation at the outset of his meetings with them (Pet. App. A 13a).

the investigation of petitioners. The attempted corruption of a federal official in the performance of his legal duties constitutes an offense regardless of whether his acts, when considered in some other context, might have been procedurally deficient. *Vinyard* v. *United States*, 335 F.2d 176, 181 (C.A. 8), certiorari denied, 379 U.S. 930; *United States* v. *Perdiz*, 256 F. Supp. 805, 806 (S.D. N.Y.). It is therefore unnecessary to consider in this case whether violation of the I.R.S. directives would require the exclusion of incriminating statements in a prosecution for criminal tax fraud, or to hold this case pending the Court's disposition of *Beckwith* v. *United States*, No. 74-1243 (certiorari granted 422 U.S. 1006). As stated by the court of appeals (Pet. App. A 14a-15a; footnote and citations omitted):

> A failure to give *Miranda* warnings, * * * even in a custodial setting, would not prevent a prosecution for an attempt to bribe a law enforcement officer made subsequent to the arrest. * * * We doubt also that it should prevent proof of the crime of bribery by showing the required intent through statements that would be excludable under *Miranda* if used to prove the crime to which the statements relate. Exclusion of statements offered for the former purpose would seem an unnecessary extension of *Miranda* even in cases of custodial interrogation; the basic purpose of *Miranda*, to prevent abusive police interrogation of persons not aware of their right to remain silent, hardly extends to tax evaders whose quick reaction is to offer to bribe the investigating officer and are then prosecuted for doing so. * * *

2. Petitioners also contend (Pet. 11-13) that the court misinterpreted a request made by the jury after it had begun deliberating to have a tape recorded conversation replayed, as a result of which the court replayed a tape in

addition to that requested by the jury, and that this error requires the reversal of their convictions. But, as the court of appeals noted in rejecting this claim (Pet. App. A 19a):

> [R]eversal for submitting material in addition to that requested is required only where the submission might indicate, or be fairly taken by the jury to indicate, prejudice of the judge against the defendant, as, e.g., when the judge insisted on submitting evidence favorable to the prosecution that was in no way germane to the request, or when it leads to biasing of the record.

None of these conditions was present here. Thus, even if it is assumed that the court misinterpreted the jury's request,[4] petitioners' contention that their convictions should be reversed on this basis was properly rejected.[5]

3. Finally, petitioner LaPonzina contends (Pet. 13-15) that the Double Jeopardy Clause of the Fifth Amendment barred his second trial and ultimate conviction.

During his opening statement at petitioner's first trial, the Assistant United States Attorney stated that the jury would be required to decide whether petitioners had been entrapped into committing the offense with which they were charged. After the opening statement had been concluded,

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[4]After having reviewed the relevant communications from the jury, the court of appeals concluded that "on this record it is hard to be sure exactly what the jury did want" (Pet. App. A 17a).

[5]The only case from another circuit cited by petitioners, *Easley* v. *United States*, 261 F.2d 276 (C.A. 5), is entirely consistent with the court of appeals' holding in this case. The *Easley* court held simply that the trial court's granting of a request by the jury to have testimony reread to them was a matter within the trial court's discretion.

the attorney representing Gentile approached the bench, objected to the Assistant United States Attorney's having anticipated the defense of entrapment and moved for the declaration of a mistrial. LaPonzina's counsel argued vigorously in support of the motion (App. 13a-15a).

Following a short recess, the court informed counsel that he had concluded that the opening statement made on behalf of the government might prove prejudicial to petitioners if in fact no entrapment defense was offered. The court asked for briefs to be submitted dealing with the questions of prejudice and whether the declaration of a mistrial would pose double jeopardy problems (App. 16a-17a). After an adjournment, and without waiting for briefs, the court asked LaPonzina's counsel, Mr. Klein, whether the motion for a mistrial was being made on behalf of both defendants. After having consulted with his client, Klein stated that "the question of entrapment really affects Mr. Gentile and it is not our motion to make" (App. 18a). The court ultimately granted the motion for a mistrial, explaining in part (App. 23a-25a):

> The defendant Gentile's attorney made application to the Court after the Government had completed its opening for a mistrial. The application was made based upon the Government's assertion in the opening that there would be a defense of entrapment. * * * The attorneys for both defendants participated in the ensuing discussion and each argued the prosecutor's opening statement would be prejudicial and could not be cured by the Court issuing cautionary instructions.
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> Generally, double jeopardy will attach once a jury is sworn, but special circumstances allow the Court to declare a mistrial and select a new jury for a sub-

> sequent trial of the defendants. The test is "taking all the circumstances into consideration, whether there is a manifest necessity for the act or the ends of public justice would otherwise be defeated by a failure to take such action." [Citing *United States* v. *Perez*, 9 Wheat. 579, and *Illinois* v. *Somerville*, 410 U.S. 458.]
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> I find the statement made in the opening as to entrapment fully within the *Somerville* test. Therefore, a mistrial is declared * * * .

We submit that the trial court acted within the permissible bounds of its discretion in terminating petitioners' first trial and that petitioner LaPonzina's contention that his second trial and ultimate conviction were barred by the Double Jeopardy Clause must therefore be rejected. The fact that LaPonzina's counsel informed the court that Gentile, and not LaPonzina, was likely to rely upon an entrapment defense meant that the reference in the opening statement to an entrapment defense was potentially more prejudicial to LaPonzina than to Gentile. As noted, moreover, counsel for both petitioners argued that the prejudicial impact of the opening statement could not be cured with a cautionary instruction. Thus, as matters stood at the time the court was considering the options available to it in responding to the prosecutor's statement, the court was confronted with the vigorous assertions of LaPonzina's counsel that the suggestion that both petitioners would rely upon an entrapment defense had incurably prejudiced their defenses, combined with a refusal on LaPonzina's part to move for a mistrial as a means of dealing with the matter. At no time, however, did LaPonzina affirmatively invoke his "valued right" to go to verdict with the jury then impanelled by requesting that his initial trial be permitted to go forward or by objecting to the declaration

of a mistrial. Instead, his counsel simply stated that the motion "is [not] mine to join in or not" (App. 19a).

In these circumstances, we believe that the court of appeals correctly concluded (Pet. App. A 11a-12a, citation omitted):

> On any view of the colloquy [concerning the declaration of a mistrial] at least one defendant had asked for a mistrial; where no evidence has been presented and no delay will ensue, we do not think a trial judge must take one horn or the other of the dilemma of refusing to recognize what he considers a valid claim of prejudice * * * in order to forfend a successful claim of double jeopardy. * * * It is immaterial that, in the exercise of appellate hindsight, we may not regard the prejudice as so great or so incurable by less drastic means.

For these reasons, as well as those additionally discussed by the court of appeals (Pet. App. A 2a-12a), petitioner LaPonzina's contention that his second trial and ultimate conviction were barred by the Double Jeopardy Clause was properly rejected.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.

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[6]A different case might perhaps have been presented had petitioner LaPonzina affirmatively objected to the declaration of a mistrial rather than having merely formally withheld his consent. When a defendant seeks to have his case submitted to the jury then impanelled, he asserts one of the interests the Double Jeopardy Clause was designed to protect. See *United States* v. *Dinitz*, No. 74-928, decided March 8, 1976, and cases cited therein. As already noted, however, LaPonzina asserted no such interest in the present case. Instead, he actively sought the termination of his first trial and then ultimately withheld his consent to that course in an obvious effort to permit him subsequently to object to a retrial on double jeopardy grounds. In such circumstances, it cannot reasonably be said that the declaration of a mistrial as to LaPonzina materially impaired those legitimate interests protected by the Double Jeopardy Clause.